to counsel for the defence to interpose, and long before the time had arrived for cross-examination, to cross-examine Chatt with some severity. The court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner."

Although it is quite right that this criticism should have been made, it cannot be doubted that the result of the present case would have been otherwise if this course had not been taken by the learned president.

Looking at the case as a whole, it is not possible to impute that the trial in the form which it took was conducted in an irregular manner by reason of the frequency and nature of interruptions by the learned president which rendered it impossible for the defence to be fairly presented. (See *Clewer* [4]). Neither can it be said that the learned president took the examination out of the hands of counsel. He interposed (indeed after all the cross-examinations and re-examinations by both counsel) in order to enable him to acquire indicative evidence. If the object of a trial is first to ascertain truth and then do justice — justice according to law — upon the basis of this truth, then the learned president is not only justified but required to elicit any facts he deems important wherever these interests of truth and justice would suffer if he fails to do that.

In these circumstances I see no reason to interfere with the conviction, certainly not on any ground submitted in argument before this court. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Sault, Keith Sellar & Co.*

YEW PHAIK HOON v. QUAH OOI KEAT & ANOR.

[P.C. (Lord Morris of Borth-Y-Gest, Lord Pearce & Lord Wilberforce) October 14, 1968]

[Privy Council Appeal No. 5 of 1967]

Practice and Procedure — Appeal — Question of fact — No sufficient reason to interfere with findings of trial judge.

Trusts and Trustees — Resulting trust — Advancement — Whether land transferred as gift or subject to trust.

This was an appeal from the decision of the Federal Court (reported in [1966] 2 M.L.J. 208) which had reversed the decision of the trial judge. The facts are as follows:

The plaintiff, the second wife of *Q.H.C.*, claimed a declaration that the first defendant, her stepson, and the second defendant, her own son, who were the registered proprietors of three pieces of land in Johore forming an oil palm estate, were not the beneficial owners but held the oil palm lands as trustees for her.

Q.H.C. became bankrupt in 1932. After his bankruptcy *Q.H.C.'s* business was carried on by the plaintiff's brother *Y.H.E.*, who was also administrator of the estate of the plaintiff's deceased father. On December 27, 1937, *Q.H.C.* transferred the oil palm lands to the Official Assignee and on January 13, 1938, the official assignee transferred the land to *Y.H.E.* On October 1, 1933, *Q.H.C.'s* discharge in bankruptcy became effective. On June 29, 1940, an agreement was signed between the plaintiff and *Y.H.E.* which recorded that it was thereby agreed: (1) all businesses of *Y.H.E.* in Kluang and Singapore, the purchases of properties, etc. in the said places were all undertaken on the plaintiff's behalf, (2) all these were then vested and returned to the plaintiff in a satisfactory manner.

Y.H.E. died on November 17, 1944, but had on November 11, 1940, executed a transfer of the lands in favour of the defendants. It was admitted that the consideration stated in the transfer was not paid. The documents of title were kept in the office of the Johore Lumbering Co. Ltd.

The Johore Lumbering Co. Ltd. (incorporated in May 1941) was a family company in which all members of the family had shares. All payments in respect of the development of the oil palm lands were made by the company and all income from the oil palms was received by the company. The actual management was in the hands of the two defendants but they drew remuneration from the company. Income tax in respect of the oil palm estate revenue was paid by the company although it was declared to the Inland Revenue as the income of the defendants. The plaintiff claimed that she had given her brother the money to buy the oil palm lands and that the defendants had been appointed only to look after the lands. Azmi J., as he then was, held that *Y.H.E.* had held the estate as trustee for the plaintiff and that *Y.H.E.* had transferred it to the defendants as trustees for the plaintiff.

The defendants appealed against this decision. In the Federal Court it was held (Thomson L.P. dissenting) that the plaintiff had failed to prove that the estate was in fact held by *Y.H.E.* in trust for her and no other and that the transfer to the defendants was at her request and they allowed the appeal. The plaintiff appealed to the Privy Council.

Held, allowing the appeal: (1) the learned trial judge had found as a fact that the estate was held by *Y.H.E.* in trust for the plaintiff and this finding could not be disturbed unless (which was not the case) supporting evidence was lacking or if some factual misapprehension of evidence is shown;

(2) the learned trial judge in this case had rejected the claim of the defendants that the lands were transferred to them by way of gift and therefore the plaintiff must succeed in this case, even though she had failed to show that the lands were transferred by *Y.H.E.* at her request.

PRIVY COUNCIL.

E. F. N. Gratiaen Q.C. and *Ian C. Bailleu* for the appellant.

T. G. Le Quesne Q.C. and *Mervyn Heald* for the respondent.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by —

Lord Wilberforce: This appeal relates to a land dispute between members of a large Chinese family in Malaysia. The land consists of approximately 1,000 acres, included in grants made by

the State of Johore numbered 17933, 17934 and 17935 which at the present time is a valuable oil palm estate. The head of the family is Quah Hong Chiam. He had two wives, Lim Phien and the appellant Yew Phaik Hoon. There were 15 children of whom the respondents are two, the first respondent Quah Ooi Keat being a stepson, and the second respondent Quah Ooi Jin a son of the appellant.

Quah Hong Chiam before 1932 was engaged in various enterprises in the State of Johore and in Singapore. His business encountered certain difficulties and in November 1932 he was adjudicated bankrupt by the High Court of the Straits Settlements. Before this bankruptcy it appears that he had occupation rights over the land in dispute which at that time was uncleared jungle land, probably of little value. Not long after the bankruptcy Yew Hun Eng, a brother of the appellant, took charge of the former enterprises of Quah Hong Chiam and reorganised them under the name of the Johore Lumbering Co., whose business included that of felling and selling timber on the oil palm land. In order to provide the necessary finance, mortgages for a total of $13,000 were raised on certain property, which formed part of the estate of the appellant's father. On 24th August 1935 it appears that an agreement was entered into between Yew Hun Eng and the official assignee in Bankruptcy in the Straits Settlements by which Yew Hun Eng obtained an irrevocable power of attorney relating to the disputed lands. This agreement is not in evidence but is mentioned in a later document: the fact that an irrevocable power of attorney was granted must indicate that some payment was either made or promised by Yew Hun Eng to the official assignee in respect of the estate.

On 1st October 1937 Quah Hong Chiam was granted a discharge in bankruptcy suspended for 12 months and shortly after, on 17th October 1937, the three grants, numbered as above, of the lands were obtained from the State of Johore. These grants, produced at the trial, are expressed to be made in consideration of a total payment to the State of Johore of $3,055 but it does not appear either from the grants or otherwise when or by whom or from what source this sum was actually paid. The grants also provided for payment to the State of Johore of annual quit rents amounting altogether to $3,723 and there were attached to the grants special conditions which imposed upon the grantee an obligation to use the land exclusively for the cultivation of oil palms and to bring them under effective cultivation within specified periods. The three grants were made to Quah Hong Chiam as grantee and he on, on 27th December 1937, transferred them to the official assignee. On 13th January 1938 Yew Hun Eng, acting under his irrevocable power of attorney on behalf of the official assignee, transferred the lands to himself. Quah Hong Chiam's discharge in bankruptcy became effective in October 1938 and, soon after, cultivation of oil palms started on the lands. They remained in the name of Yew Hun Eng. Notwithstanding the discharge in bankruptcy it appears that Yew Hun Eng remained in charge of Quah Hong Chiam's former business until 1940, when he decided to return to his own residence in Penang. Before he did so, he executed on 29th June 1940 an agreement with the appellant. This agreement recited that Yew Hun Eng owed the appellant $6,000 and provided for the discharge of this debt by credits or payments by Yew Hun Eng. It contained the following clauses which are relevant to the present dispute:—

> "(1) All businesses of Yew Hun Eng in Kluang and Singapore, purchases of properties etc., in the said places were all undertaken on Yew Phaik Hoon's behalf:
>
> (2) All these are now vested and returned to Yew Phaik Hoon in a satisfactory manner. . . ."

On 9th November 1940 Yew Hun Eng executed a transfer of the disputed lands to the respondents. This transfer was expressed to be made in consideration of the payment by the respondents of $36,000 but it is common ground that no money was paid or consideration given. This transfer was duly registered but the documents of title at no material time were in the possession of the respondents. In fact it appears that they were held either by the appellant or possibly by Lim Phien and later by Quah Hong Chiam.

In May 1941 a limited company called the Johore Lumbering Company Limited was formed to take over the various undertakings which had previously been carried on under the name of Johore Lumbering Company. The shares in this company numbering 96 were distributed on the instructions of Quah Hong Chiam between members of the family including Quah Hong Chiam, his two wives, his sons and other relatives. It is material to the present appeal to state that the two respondents received the same number of shares as the other sons except that the second respondent was allotted three additional shares on account of some money of his own which he had contributed.

From 1941 onwards the oil palm estate was managed by the respondents with the assistance or under the supervision of Quah Hong Chiam but they did not contribute anything out of their own money towards the expense of developing it nor did they take the profits arising from its cultivation. All the payments for rent, taxes and otherwise were made by the Johore Lumbering Company Limited, and all the income from the land was received by the company. The respondents received remuneration for their work and, in common with other members of the family, were given maintenance payments out

of the company's income. Finance for the rehabilitation of the land which was necessary after the war was provided by the Industrial Rehabilitation Finance Board on the security of a charge on the property. This charge was paid off in or about 1957 out of the resources of the company but the respondents did not receive or seek to obtain possession of the title deeds.

Towards the end of 1959 the respondents asserted a claim to the ownership of the oil palm estate by registering the business carried on there under their own names. In consequence the writ in the present proceedings was issued on 5th November 1962. In her statement of claim the appellant alleged that Yew Hun Eng held the properties in trust for her and that the transfer by him on 9th November 1940 to the respondents was made at her request, with the consequence that the respondents held the land as trustees for the appellant. In the particulars of the statement of claim, the appellant alleged that the trust was created in or about August 1935 as the result of an oral arrangement between Yew Hun Eng and the appellant and that written confirmation of this trust was to be found in the agreement of 29th June 1940; the alleged request to Yew Hun Eng to transfer to the respondents was said to be oral. In their defence as originally delivered the respondents restricted themselves to a denial of the appellant's allegations and to a plea of estoppel; but by an amendment made at the commencement of the trial they set up a positive allegation that the disputed property was given to them by Quah Hong Chiam in November 1940. They also alleged that if, contrary to their contentions, any trust was imposed on the properties these arrangements were carried through with a view to fraudulently avoiding the provisions of the Estate Duty and Income Tax Ordinances. This particular plea was exposed to the comment that income tax was not introduced until 1947.

On these issues the action came for trial before Azmi J. in the High Court. In ascertaining the facts, the learned trial judge was faced with serious difficulties. The documentary evidence, as summarised above, provided no decisive material upon which to decide between the claims of the parties. The respondents were admittedly, the registered owners of the land, and if a trust was to be imposed on their ownership, this must be clearly established by oral evidence as to what took place over 20 years ago. Unfortunately the person best qualified to speak as to the circumstances in which the land was acquired and later transferred to the respondents, namely Yew Hun Eng, was dead (he died in 1944). The appellant was, at the date of the hearing, 82 years of age, blind and handicapped by illiteracy. Quah Hong Chiam was over 80 years old. The other witnesses namely Quah Ooi Chim, the eldest son of Quah Hong Chiam, who acted as secretary of the Johore Lumbering Company Limited and who drafted the agreement of 29th June 1940, and the respondents themselves were interested parties. All the learned judges commented, with justification, upon the incompleteness and, in important respects, inconsistency of the evidence given.

Their Lordships approach the difficult task of arriving at a factual conclusion with two considerations in mind. First, the form in which the appellant's claim is made is by setting up a trust, binding initially upon Yew Hun Eng, and later, by transmission upon the respondents. There are obvious dangers in seeking to impose conceptions of English equity upon persons such as those concerned in the present case, lacking in knowledge of English institutions and, to a large extent, in literacy. Secondly, the transactions relating to the disputed land form part of the intricate arrangements of a large Chinese family, whose business affairs may well be managed upon a basis of understanding and convention, well appreciated by its members, but not easily made explicit in legal form. It may well be that the reality of the matter is that these lands, as other assets, were not intended to belong exclusively to any one or two persons but represented, in an undefined and fluid sense, family property. The present litigation has presented the courts with two stark alternatives, neither of which may satisfactorily reflect what either side intended — yet the choice has to be made between them.

Their Lordships commence, as is appropriate when the dispute is mainly factual, by examining the findings of the trial judge. They have to ascertain what findings (as distinct from inferences) he made, and then to consider whether there was evidence on which he could make them. Attention must first be focused upon the circumstances in which the disputed lands were acquired by Yew Hun Eng. That he acquired them, not on his own behalf, but as trustee or agent, is common ground; the question is, for whom. The appellant's case was that he acquired them as trustee for her, relying, in her pleading, upon an oral arrangement made prior to, or in or about August 1935, and confirmed by the agreement of 29th June 1940. The date August 1935 was evidently derived from that of the irrevocable power of attorney granted to Yew Hun Eng by the official assignee which, not itself in evidence, was recited in the transfer by Yew Hun Eng (as attorney) to himself of 13th January 1938. The evidence called on the appellant's behalf was directed to showing that the consideration for this transfer was provided by the appellant, and all three witnesses called on her side, in fact gave evidence to this effect. The appellant herself said that she provided the money and handed it to her brother: she linked this evidence with the transfer from the official assignee. Later,

in re-examination, she said she bought the land for $600 which sum came partly from her mother and partly from old jewelleries: the land was, at the time, jungle land. Quah Hong Chiam said that Yew Hun Eng bought the lands on behalf of the appellant and that her mother provided the money: he mentioned no particular sum. Quah Ooi Chim said that the appellant provided the money, $600.

It can hardly be said that this evidence was satisfactory or complete. The provision of a mere $600 as consideration was difficult to reconcile with the fact that $3,055 had to be paid to the State of Johore, and the manner in which this payment was raised was never explained. Moreover, though a good deal of evidence was given about the sum of $13,000 raised by mortgage of part of the appellant's father's estate, the connection, if any, between this sum and the consideration for the purchase of the oil palm lands was never established, nor was any other source for the provision of this consideration, other than a reference to jewellery, shown. To demonstrate how such a sum as $600, or even $3,055, was raised so long ago, at a time when the bankruptcy of Quah Hong Chiam might inhibit the keeping of accurate accounts, is evidently a hopeless task.

The learned trial judge dealt with the matter in this way. He summarised, rather briefly, but quite fairly the evidence and the contentions of either side and then said:—

> "In so far as the oil palm estate is concerned, I hold the view on the evidence before me that it was bought from the official assignee by Yew Hun Eng on behalf of the plaintiff, and Yew Hun Eng, therefore, held the land merely as trustee for the plaintiff".

In the Federal Court of Malaysia, the majority rejected this conclusion. Ong Hock Thye Ag.C.J. as well as thinking the evidence, and the appellant's story, to be improbable, considered that in any event, Yew Hun Eng could not become a trustee for her unless there was unambiguous proof to displace the abundant evidence that Yew Hun Eng was a mere tool and false front for the bankrupt. Ismail Khan J. though thinking that the appellant was perfectly in possession of her faculties, considered that she was reluctant to tell the whole truth, and also referred to the false front in the person of Yew Hun Eng. Lord President Thomson on the other hand, after declaring that he attached little value to the evidence of the parties, on balance thought that the appellant should succeed, finding three considerations which swung the balance in her favour, the first of which, and that relevant on this part of the case, was that, on credibility, the trial judge clearly preferred the evidence for the appellant. On balance their Lordships share this view. No doubt the judge's finding is a compound finding, resting on inference from the documents as well as upon the oral evidence given: and credibility was not the only touchstone of the latter. But in their Lordships' opinion a decision on this vital question, who provided the consideration for the lands when acquired by Yew Hun Eng, was sufficiently of the nature of a decision on fact to make it one for the trial judge, only to be disturbed if (which is not the case) supporting evidence is lacking, or if some fatal misapprehension of the evidence is shown. This, in their Lordships' view was not done, and though the agreement of 29th June 1940 is in some respects obscure, and possibly divergent from the real facts, the learned judge was in their Lordships' view entitled to regard it as supporting to some extent the appellant's case. It can moreover be said that one of the main considerations which led the majority of the Federal Court to reverse his finding was that Yew Hun Eng was a false front for the bankrupt. But this was not pleaded (though the defendants did allege a different variety of irregularity), nor in their Lordships' opinion was there any real evidence to support it. Yew Hun Eng was no doubt acting in the bankrupt's interests but it was not shown that the assets he used were the bankrupt's own and were not derived from the appellant and others of his family. The estimate of the appellant as a person reluctant to tell the whole truth was one appropriate, if at all, for the trial judge rather than for a Court of Appeal, and it does not appear that Azmi J. so regarded her as such a witness.

Lastly, while it may be true that the appellant's evidence did not come up to her pleading (in so far as she relied upon an arrangement in 1935), the facts established were both within those pleaded and also sufficient to establish that Yew Hun Eng acquired the land upon trust for her: the use of the concept of trust in this connection means no more than that she provided the money and that Yew Hun Eng took the transfer of the lands on her behalf.

The second stage in the case, involving the transfer to the respondents, is easier to deal with. The respondents provided no consideration and it must follow that, unless the lands were gifted to them, they would merely succeed to Yew Hun Eng's title and hold them as trustee, or agent, for the appellant. In fact they alleged a gift and gave evidence accordingly. This the appellant and her witness denied. The learned trial judge, after stating the rival contentions, found as follows:—

> "There seemed to be an idea in the family that the land must be registered in the land office in the name of whoever was to look after the property. On the facts of this case, therefore, I accept the evidence of the plaintiff, her husband and her eldest son that when this property was transferred to the two defendants after the departure of Yew Hun Eng for Penang, the two defendants were to hold the property in trust for her."

In the Federal Court this finding was criticised — in relation particularly to the appellant's pleading that the land was transferred at her request — on the ground that the appellant herself said that she knew nothing about business but left it all to her husband and son, and that she only came to know that the land was in the names of the respondents shortly before the issue of the writ. This, said Ong Hock Thye Ag.C.J. was fatal to the appellant's claim. Their Lordships agree with this comment to the extent that it must be accepted that the appellant did not succeed in showing that the lands were transferred to the respondents "at her request" unless, at least this expression can be extended to include a request made by her husband Quah Hong Chiam on her behalf. But their Lordships do not consider that this criticism disposes of the finding of the trial judge which their Lordships can only read as unequivocally rejecting the respondents' claim that the lands were transferred to them by way of gift a finding he was fully entitled to make on the evidence. If this claim is rejected, then the appellant must succeed, and it does not matter to the result that she failed to show that the lands were transferred at her request. Whether she made any request, direct or indirect, or not, she established that the lands were transferred by Yew Hun Eng without consideration and not by way of gift, that is both consistent with her pleading and is enough to make good her case.

Their Lordships, upon the whole of this difficult appeal, therefore are of opinion that the decision of Azmi J. ought to be restored and the judgment of the Federal Court reversed. They will advise the Head of Malaysia accordingly. The respondents must pay the appellant's costs.

Appeal allowed.

Solicitors: *Lipton & Jefferies; Coward, Chance.*

RE MAKHANLALL & CO. LTD.

[O.C.J. (Wee Chong Jin C.J.) October 18, 1968]
[Singapore — Certiorari No. 1 of 1968]

Certiorari — Whether applicable in respect of exercise by magistrate's court of statutory powers — Order prohibiting building from being used for human habitation — Certificate of building surveyor must show that immediate steps must be taken to prevent building from falling down — Excess of jurisdiction if order made in absence of such certificate — Construction of statute — Local Government Intergration Ordinance, 1963, s. 63.

This was an application for an order of *certiorari* to quash the orders of a magistrate's court under section 63(4) and 63(5) respectively of the Local Government Intergration Ordinance, 1963. On the facts the magistrate had made the orders in question on the strength of a certificate by the chief building surveyor that the building was "in danger of collapse". Section 63(4) of the Ordinance, requires the chief building surveyor to certify that "immediate steps ought to be taken to prevent the building from falling down" as a precondition to the making of an order of the magistrate's court.

Held: the magistrate's court in this case had acted in excess of its jurisdiction in making the two orders and the orders must therefore be quashed.

Case referred to:—

(1) *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66.

MOTION.

Sachi Saurajen for the applicant.

Ho Thian Cheh (State Counsel) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is a motion for an order of *certiorari* to quash an order of a magistrate's court made on the 4th day of October 1967 under section 63(4) of the Local Government Intergration Ordinance 1963 (hereafter referred to as "the Ordinance") and an order of the same magistrate's court made on the 30th day of October 1967 under section 63(5) of the Ordinance.

The material facts are not in dispute and are these. The applicants occupy the ground floor of No. 20 Malacca Street as tenant and carry on business therein as importers, exporters and commission agents. They have been such tenants for more than twenty five years. On 4th October 1967 one Tio Seng Chin who it is conceded is the Chief Building Surveyor, made a sworn complaint before a magistrate in the 9th magistrate's court, the contents of which were as follows:—

"An inspection has been made by Mr. Tan Hock Meng, Assistant Building Surveyor of this department on No. 19/20, Malacca Street, which is a three-storey brick offices building and on a free standing wall at the back.

Due to the structural defects in the structure the building and the wall are found to be in danger of collapse.

I attach herewith a certificate regarding the structural condition of the building and the wall by Mr. Tan Hock Meng, Assistant Building Surveyor of this department.

I pray for a Court Order against the occupiers under section 63(1) of the Local Government Intergration Ordinance, 1963, and a Demolition Order under section 63(4) of the said Ordinance."

The certificate referred to in the sworn complaint was in the following terms:—

"Certificate on Structural Condition of 19/20, Malacca Street and a free standing wall at the back.

I, the undersigned, hereby certify that I have inspected on 3.10.67, building No. 19/20, Malacca Street, known as Namazie Building, which is situated at the junction of Malacca Street and a back lane.